No. 2467

United States Circuit Court of Appeals---Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation, and TONOPAH & GOLDFIELD RAILROAD COMPANY, a corporation,
Plaintiffs in Error,

vs.

GOLDFIELD CONSOLIDATED MILLING AND TRANSPORTATION COMPANY, a corporation,
Defendant in Error.

Petition for Rehearing

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By....., *Deputy Clerk.*

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PETITION FOR REHEARING

To the Honorable,

The Circuit Court of Appeals of the

United States, for the Ninth Circuit.

Plaintiffs in error respectfully petition for a rehearing of the decision rendered by this honorable Court in the above entitled cause, upon the ground that the decision rendered by this Court in the above-entitled cause, affirming the judgment of the District Court, is in contravention of the Sev-

enth Amendment to the Constitution of the United States, and deprives plaintiffs in error of the rights guaranteed to them by said Seventh Amendment, in that it requires plaintiffs in error to pay unto defendant in error the sum awarded by the judgment of the District Court as "damages," in the absence of any evidence whatever introduced before the Interstate Commerce Commission or before the District Court, showing that defendant in error has sustained or suffered any damage whatsoever.

ARGUMENT

The sole question presented to this Court for determination is whether the opinion, report and order of the Interstate Commerce Commission are entitled to any evidentiary value.

It is respectfully submitted that the judgment of the Circuit Court of Appeals, when reduced to its final analysis, gives to the Commission's decision and order the value of a judgment of a judicial tribunal. The statute does not contemplate that decisions and orders of the Commission shall have this effect, and it is respectfully represented that if such an interpretation can be placed upon the Act it must be held to be unconstitutional, because the statute would have conferred upon one tribunal legislative as well as judicial power, in contravention of the express provisions of the federal constitution.

The Supreme Court of the United States has held that the power conferred upon the Interstate

Commerce Commission by the statute is legislative and not judicial. (*Prentiss* vs. *Atlantic Coast Line Railway*, 211 U. S. 210, 226.)

Complainants in cases such as this must bring their complaints before the Interstate Commerce Commission and obtain an order holding that the rates complained of are unreasonable, merely as a jurisdictional prerequisite, which will enable them to bring an action such as the case at bar, to determine whether they are entitled to an award of damages by way of reparation.

> *Abilene Cotton Oil Co.* vs. *Railroad*, 204 U. S. 426;
>
> *Robinson* vs. *B. & O. R. Co.*, 222 U. S. 506, 511;
>
> *Lehigh Valley R. Co.* vs. *Clark*, 207 Fed. 717.

OF
QUESTION [redacted] DAMAGES MUST BE JUDICIALLY DETERMINED

In proceedings involving the question of reparation, carriers are entitled to a *judicial* determination of the questions necessarily involved in such proceedings.

> "If the law be such as to make a decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such law to be unconstitutional."
>
> Ex parte Young, 209 U. S. 123, citing *Chicago etc. R. Co.* vs. *Minnesota*, 134 U. S. 416.

"The legislature may determine what private property is needed for public purposes. That is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. * * * (*Monongahela Navigation Co.* vs. *U. S.*, 148 U. S. 312, 327).

And the Supreme Court held that:

"The same principle applies when vested rights of property are disturbed by the legislative enactment in respect to rates."

Chicago Milwaukee & St. Paul R. Co. vs. *Tompkins,* 176 U. S. 173.

THE COMMISSION'S DECISION AND ORDER HAVE NO EVIDENTIARY VALUE

THE COMMISSION MADE NO FINDINGS OF FACT

Section 14 of the Interstate Commerce Act, as amended June 26, 1906, expressly provides that "In case damages are awarded, such report shall include the findings of fact on which the award is made."

The Commission made no findings of fact in the case at bar, and therefore its mere *conclusion* "that complainant has been damaged to the extent of the difference between the amount paid and the amount which it would have paid at the combination through rate," etc., is not a compliance with the statute.

It has been held by the Circuit Court of Appeals for the Third Circuit, in the Lehigh Valley Case, that "The imperative command of Section 14, that in case damages are awarded such report shall include the *findings of fact on which the ruling is made*, evidently contemplated a distinct enumeration of such findings by the Commission, with reference to their proposed use in a jury trial."

In the absence of specific findings of fact by the Commission, as required by the express provisions of Section 14, the order of the Commission is not entitled to any evidentiary value.

THE COMMISSION'S ORDER IS UNSUPPORTED BY ANY EVIDENCE

Irrespective of whether the conclusion of the Commission that "complainant had been damaged" may be considered as a *"finding of fact,"* the Commission's decision and order and its conclusions are wholly unsupported by any evidence of any kind, character or description. The transcript may be searched in vain for one word of evidence showing that the defendant in error sustained any damage.

It is the duty of this Court, in a proceeding such as this, to inquire into and determine this question, which is one of the fundamental issues framed by the pleadings;

Louisville & Nashville R. Co. vs. *I. C. C.*, 227 U. S. 88, 92;

I. C. C. vs. *Union Pacific R. Co.*, 222 U. S. 541, 547;

I. C. C. vs. *Illinois Central R. Co.*, 215 U. S. 452, 470;

but neither the trial Court nor this Court has given any consideration to this fundamental question.

Even in cases where the Commission may enter an order determining the reasonableness of rates, the decision and order must be predicated upon substantial evidence actually introduced before the Commission.

> *Louisville & Nashville R. Co.* vs. *I. C. C., supra.*

A fortiori the same rule should be applied in cases involving questions of reparation.

The character of evidence that must be adduced in order to support a finding and order of reparation is fully disclosed by the Commission's own decisions.

In deciding the case of *New Orleans Board of Trade* vs. *Illinois Central R. Co.,* the Commission held that:

> "Mere proof of specific shipments made, and the freight paid, and the amount for which reparation is sought, does not make out a *prima facie* case. *Something more is necessary.* The complainant must show how the discrimination found to exist affected him to his damage; in other words, he must *establish the fact* of his damage as well as the amount of his damage he claims."
>
> 29 I. C. C. 32, 33, 34.

The Commission affirmed this ruling in the case of *Spiegle* vs. *Southern Railway Co.,* decided January 19, 1915:

> "Since our former opinions were promulgated the United States Supreme Court in *International Coal Co.* vs. *Pennsylvania R. Co.,* 230 U. S. 200, has held that before an award of reparation can be made on account of undue discrimination or preference on the part of carriers subject to the Act, the complainant must prove that he was actually damaged by reason of such undue discrimination or preference, and furthermore must prove the amount of such damages.
>
> Mere proof of particular shipments made and of the freight paid does not make out a prima facie case. *New Orleans Board of Trade* vs. *I. C. R. Co.,* 29 I. C. C. 32."

In the case of International Coal Mining Co., cited by the Commission in their last quoted decision, the Supreme Court of the United States holds that:

> "Before any party can recover under the act he must show not merely the wrong of the carriers, but that that wrong has in fact operated to his injury. * * * * *The statute gives the right of action for damages to the injured party,* and by the use of these legal terms clearly indicated that the damages recoverable

> were those known to the law and intended as compensation for the injury sustained. * * * * And although the plaintiff insists that in all cases like this the fact and the amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the Act." * * * *

It is respectfully submitted that this Court should review the transcript of proceedings before the Interstate Commerce Commission which were introduced in evidence by the plaintiffs in error at the trial, and if the unqualified statement *that there is not one syllable of testimony relating to the fact that defendants in error have sustained any damage,* is borne out by the transcript, this Court should grant a rehearing of this case and reverse the judgment of the trial Court, upon the ground that the Commission, in rendering its decision and order relating to reparation, has undertaken to exercise a power which has not been conferred upon it, and that its order is void.

In deciding the questions on appeal this Court did not pass upon this fundamental question. The Court, in deciding the case, held that there was no proof offered to the trial Court relating to the damage, with the exception of the "findings (?), conclusions, and order of the Interstate Commerce Commission." (Decision, pages 2 and 3.)

It therefore appears that, even though the Commission's conclusions can be dignified by considering them findings, these "findings" are wholly and entirely unsupported by evidence, and therefore there was no *finding of fact* of the Commission before the Court, upon which the Court could find that defendant in error had been damaged.

No "evidence" was introduced before the trial Court to prove damage. The judgment of the trial Court is contrary to law, not only because there were no findings of fact made by the Commission, and because the order entered by the Commission was wholly unsupported by the evidence, but also because the order of the Commission is not entitled to any evidentiary value.

In the case of *Lehigh Valley Railroad Co.* vs. *Clark,* 207 Fed. 717, 721, the Circuit Court of Appeals says:

> "In reparation cases there is a controversy at common law as to whether the damages awarded by the Commission, or any damages, are recoverable; and the *mere order of the Commission* * * * only figures in the case as a necessary condition precedent to the bringing of the action, though the *findings of facts* by the Commission, as set forth in its report, are prima facie evidence of the matters therein stated. *The damages sought are only recoverable by the verdict of a jury and judgment*

thereon, as in ordinary trials at common law." (Italics here, as elsewhere, ours.)

The Court announces clearly that:

> "In a reparation case, though the award of damages by the Commission, following its *findings of fact* that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of the suit for damages authorized by the statute, it is not capable of enforcement as an administrative order, and is *not of itself evidence of liability, prima facie or otherwise, in any judicial proceeding.* * * *
>
> It hardly needs that attention be called to what is so obvious, that both the 'findings and order' are prima facie evidence only of the *facts* therein stated. This is very far indeed from declaring that the order itself, awarding reparation, is prima facie evidence of damages, or the proper measure thereof."

This Court concedes in its opinion that it was incumbent upon the defendant in error to prove its damage, but differentiates the case at bar from the case of *Lehigh Valley* vs. *Meeker, supra,* by reason of the fact that the Commission, in rendering its decision in the Lehigh Valley case, concluded that the complainant was "entitled to reparation" on all shipments, whereas in the case at bar the Commission reaches the conclusion that the defendant in error was "damaged to the extent of the differ-

ence between the amount paid and the amount which it would have paid at combination of the through rate * * * in the sum of $447 * * *''

The situation in the case at bar is identical with that in the case of *Lehigh Valley R. Co.* vs. *Meeker,* 211 Fed. 785, as is shown by the language employed by the Circuit Court of Appeals at page 797:

> ''As to these documents thus admitted in evidence, it is apparent that the requirement of Section 14, that 'in case damages are awarded, such report shall include the findings of fact on which the award is made,' has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report *there are no findings of fact, as such,* and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damage.''

Here, as in the Meeker case, *the report contains no findings of fact.*

It is respectfully submitted that a rehearing should be granted, upon the ground, to use the language of the Circuit Court of Appeals, that:

> "There were no sufficient findings of fact in these reports of the Commission, as required by the statute; second, that if any of the statements in that * * * report could properly be considered as findings of fact within the meaning of the statute, so as to make such findings prima facie evidence of the facts found, they were not sufficient to support the plaintiff's claim, or to make out even a prima facie case for damages."

To hold that the statements made by the Commission in its decision and order have any evidentiary value is to deny plaintiffs in error the rights guaranteed to them by the Seventh Amendment to the Constitution of the United States, and as was said by the Circuit Court of Appeals for the Third Circuit:

> "The distinction between reparation and non-reparation cases, so anxiously made by Congress, in order to conform to the spirit of the seventh amendment, would be practically nullified if, in prosecuting a suit for damages actually sustained by reason of a violation of the law, the liability for such damages, and the amount thereof, as found by the Commission, must be conceded in the first instance."
>
> *Lehigh Valley R. Co.* vs. *Meeker,* 211 Fed. 785, 808.

The Court further held that the defendants in cases such as this should not be called upon "practically to prove a negative and show that plaintiff was not damaged, or that the amount claimed was less than that stated by the Commission," because "these facts, or the facts upon which they depend, are all peculiarly within the knowledge of the plaintiff, and it is fundamental that neither party to a suit should be required to prove or disprove what is peculiarly within the knowledge of the opposite party." (*Lehigh Valley* vs. *Meeker, supra,* page 808.)

The principles involved in the case at bar are identical with the principles involved in the Meeker and Clark cases, *supra,* and the rules there announced are supported by the decision rendered by the Supreme Court of the United States in the case of *Pennsylvania Railroad Co.* vs. *International Coal Mining Co.,* 230 U. S. 184, 200. It is therefore respectfully submitted that plaintiffs in error are entitled to a rehearing, and they respectfully petition that they be permitted to present the matter further to the Court by way of oral argument.

Respectfully submitted,

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We hereby certify that the foregoing petition for rehearing is, in our judgment, well founded in point of law and the same is not interposed for delay.

Dated, February 22nd, 1915.

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